THE STATE OF OHIO)
)
ASHTABULA COUNTY)

IN THE COURT OF COMMON PLEAS

No. 8385

THE STATE OF OHIO,
Plaintiff,
-vs-
ROBERT LEROY PRUETT,
Defendant,

OPINION
ON
MOTION FOR NEW TRIAL

Attorneys for Plaintiff:
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Attorneys for Defendant:
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PONTIUS, J.:

As announced by the Court at the outset of the hearing on the Motion for New Trial, only those matters which are set forth in the motion and which were actually urged upon hearing will be considered and passed upon by the Court in ruling upon this Motion for New Trial. All other matters, concerning which a Motion for New Trial is necessary as a predicate for further action, will be deemed to have been waived by the defendant.

The first ground advanced in the argument is ground 7 of the motion wherein it is claimed the Court abused its discretion, by reason of which the defendant was prevented from having a fair trial and that this occurred in two respects; first, with reference to the admissibility of certain photographs offered by the State and second, with respect to the Court's action in limiting defense testimony on so-called surrebuttal.

With reference to the photographs of the nude body of the victim, it is admitted by the defense to have been proper to show at least some of such photographs as bearing directly upon the res gestae of the crime and the circumstances there shown. The argument is made, however, that there was an abuse of discretion by the Court in admitting too many of them, that they were shocking in nature, and served only to inflame the jury.

A total of seventeen of such photographs were properly identified and offered in evidence. Four were rejected by the Court and thirteen admitted. No one of these photographs showed all of the following details but all of them together tended to show the following: the nude body in the underbrush as it appeared when the officers first arrived, the clothing of the victim and its condition and relation to the body, the area immediately surrounding the body, the position of it in detail with reference to position of hands and arms, detail as to injuries of the face and head, the medal worn around the neck of the victim (by which identification was made), a chest wound, the area staked out where the body had been immediately after its removal and showing blood spots on the ground, the condition of the ground where the body had lain with stakes marking its prior position.

Generally speaking, and particularly in criminal cases, photographs are admissible, though they be shocking and ghastly in character, when taken of the murder victim to show the condition of the body, the location of it, the nature of the injuries inflicted, and in sex offenses especially, the scene of the crime as bearing on the voluntary character of the claimed assignation. The authorities on this point are myriad in number. Reference is here

made to 15 OJ 2d 606; Scott on Photographic Evidence, para. 652, 695, 692, 661, and 866; People vs Northcott, 189 Pac. 704 (Cal.); and a vast number of cases cited in the National Reporter System under Criminal Law at para. 438 and 1169. It is my conclusion that if photographs are admissible for any purpose, they are not to be excluded because they are gruesome, revolting or ghastly if they have any legitimate purpose in describing the res gestae of the crime or otherwise. If such were not the rule, the more horrible the offense being investigated, the more difficult would become the matter of proof, because assuredly matters of this character are most difficult to totally describe by word of mouth only from the witness stand. Realizing that I am here passing upon the exercise of my own discretion, nevertheless I fail to see any claim for abuse of discretion on this point.

The defense testimony tended to show that the defendant had returned home at 1:30 A.M. the morning of September 15th. It also raised an inference, at least, that the wife of the defendant did not leave the house until they both left together, approximately 8:45 in the morning. In rebuttal, the State produced an eye witness, a close-by neighbor, who saw the defendant's wife leave the house at 3:10 A.M. The defense then offered in so-called sur-rebuttal photographs, the purpose of which was to prove that the eye witness could not have observed defendant's wife leave, or at least would have great difficulty in doing so, and also offered testimony of two other occupants of the house, who had already testified for the defense, and sought to show through them that defendant's wife in fact had not so left the house. Objection to this proffer was sustained by the Court. The defendant and then

his wife each testified that the wife did not in fact so leave the house. This evidence of the defense was offered in substantially the order above set forth.

It is admitted by the defense that under the provisions of R.C. 2945.10, which prescribes the methods of procedure in criminal cases, there is no express provision for the presentation of surrebuttal evidence. The argument, however, is in short that because the defense had no knowledge of this eye witness, the Court in the exercise of its discretion under R.C. 2945.10 should have allowed this refuting evidence.

Even in states where by procedural statutes the endorsement on the indictment or the otherwise giving notice of the names and addresses of the witnesses to be relied upon by the State are required, still such a statutory rule does not extend to rebuttal witnesses. See numerous cases cited in 23 CJS, pg. 777, para. 948. The reasoning applied in some of these cases is to the effect that that which is rebuttal in nature is no surprise to the defendant. The rule seems to be well settled in Ohio, as well as elsewhere, that when rebuttal testimony is offered only to refute a defensive issue, no occasion arises for the admission of surrebuttal testimony by the defendant and the denial thereof is not an abuse of discretion. See State vs Lett, 106 OA 285; State vs Blanton, 111 OA 111. Attention is also called to the case of People vs Simms, 393 Ill. 238, 69 NE 2d 86, a case which is almost on all fours with the point raised by the defense in Pruett respecting the proffer through Wilbert Dyer, of testimony concerning the setting of the moon. In Simms, rejection of pages from the almanac to prove there was no moon was upheld and the witness in that case was no more

certain on the point than was Mrs. Karr in the Pruett case.

The Court permitted the defendant and his wife to testify, as above noted. The Court's reasoning at the time was substantially this, that an explanation as to why the wife left the house at that hour ought to be allowed. Of course, she denied rather than explained it. This is not to say, however, that because the Court exercised its discretion in that direction with reference to that possible testimony the Court was required to back up and thereafter allow the introduction of the photographs and other testimony above referred to, or having barred the photographs and other testimony in denial of the witness Karr necessarily meant that the denial should carry through to the wife and the defendant and thereby bar the possible explanation of her leaving the house. It should be kept in mind that the issue of fact was first raised by the defense testimony and not during the State's case in chief. It does not seem that the point of abuse of discretion is well taken.

Under its claim of misconduct of the jury, the defense sought to prove what it claimed amounted to misconduct of the jurors and sought to do so solely through evidence by way of an affidavit of one of the jurors and the oral testimony of another. No evidence aliunde or dehors the proposed testimony of the jurors was offered. The Court ruled such evidence inadmissible. The claim is made that since the acts amounting to claimed misconduct occurred outside the Jury Room, or at least prior to the final submission of the case, that the usual rule of aliunde evidence is not applicable and that the jurors themselves may be called directly to testify concerning such matters and in this way thus impeach their verdict.

Before proceeding further, it should be pointed out that the claimed misconduct, if it were such, deals only with the communications of the jurors among themselves, that is to conversations concerning evidence admitted upon the trial and not in any way touching upon an outside communication or factual matter not in evidence. The rule has long been adhered to in this state that affidavits of jurors stating matters of alleged misconduct are not competent to support an application for a new trial unless evidence aliunde if first offered or unless the Court has acquired knowledge of the Jury's behavior from other sources. 16 OJ 2d 56. True, in most instances where the issue has arisen, efforts have been directed toward uncovering what went on in the Jury Room after final submission or with claimed communications with the jurors by outsiders, as distinguished from what is claimed to have transpired before final submission of the case. Examples of this type of cases in Ohio are Farrer vs State, 2 OS 54; Kent vs State, 42 OS 426; Schwindt vs Graeff, 109 OS 404; Wicker vs Cleveland, 150 OS 434; and State vs Miles, 59 NE 2d 39. The rule is one of deep seated public policy to the effect that testimony or affidavits of jurors themselves will not be received for the purpose of impeaching the verdict, at least until other evidence on the subject is first offered.

Whether the claimed misconduct occurred before or after final submission of the case to the jury, the policy involved would be violated in either event if the jurors alone were allowed to thus impune the verdict. Panel members become jurors immediately upon being sworn. The finality of jeopardy then attaches and the jurors certainly do not don a different cloak when the case is

finally submitted. This Court believes the rule should be the same whether the claim of misconduct occurs before or after final submission of the case. Such seems to be the general rule and the following are just a few of the many cases on the point. State vs Ferguson, 182 SW 2d 38; Huddleston vs. State, 64 Southern 2d 90 (Ala.); Gossett vs State, 48 SE 2d 71 (Ga.); State vs Finnell, 280 SW 2d 110 (Mo.); Lindsey vs State, 25 SW 2d 533 (Tenn.); People vs Evans, 246 Pac. 2d 636 (Cal.); State vs Olivèr, 192 Southern 725 (La.); and State vs Ingersoll, 292 Pac. 250 (Mont.). Such will likewise be the ruling of this Court. See Locicero vs State, 14 Abs. 109.

Under the rule barring testimony of jurors to impeach their own verdict, it is nevertheless almost universally held that testimony of jurors, however, may be admitted to sustain the verdict and this procedure is resorted to most often when a prima facia showing of misconduct is first made; but in the present case, since the Court has ruled that the affidavit and testimony of the two jurors are inadmissible to impeach this verdict, the State's affidavits of thirteen jurors, seeking to sustain the verdict by showing no misconduct, are irrelevant. Consequently the defense objection to the admissibility of these affidavits will be sustained.

Next it is argued that the defendant did not have a trial by a fair and impartial jury as required by the constitution for the reason that juror Gillespie had a prior fixed opinion that the defendant was guilty and withheld disclosure of such opinion upon inquiry on voir dire. In support of this contention, reference was made to the voir dire examination, and the affidavit and oral testimony of prospective juror Osborne were offered and admitted

in evidence. In the opinion of the Court, the contention of the defense is not supported in either respect. In the first place, questions put upon voir dire clearly indicated that the juror had discussed the case pro and con, that opinions on guilt or innocence had been expressed, and indicated he may have expressed such an opinion himself. He did, however, answer unequivocally that he had no opinion as to guilt or innocence as he was then questioned.

Osborne's affidavit is direct and positive and by its language certainly would tend to indicate a false answer on the part of Gillespie when inquired of on voir dire examination. The Court, however, recognizes, as well he must, that the affidavit is in the language of defense counsel and not necessarily in the language of the witness. Osborne's oral testimony regarding the same subject, on the other hand, is much less specific, somewhat equivocal, and indicates the possibility that whatever he heard may have been spoken by one of four in a group of prospective jurors, two of whom were excused upon challenge for cause because they held fixed opinions on either guilt or innocence.

Osborne was positive that some of the conversation he attributed to Gillespie took place on Wednesday, the third day of trial, whereas the minutes of the trial show that both were called into the Jury Box on Tuesday, the second day of trial, and Osborne was then excused because he had a very definite opinion in opposition to capital punishment. Osborne admits that he had no direct conversation with Gillespie but claims the statements attributed to him were remarks that he overheard in a group conversation.

Gillespie categorically denied any such statements as attributed to him by Osborne and various others of the prospective

jurors in company with Osborne and Gillespie in the assigned place for the meeting of the prospective jurors deny hearing any such statement from Gillespie. The Court fails to find under this state of the evidence that prospective juror Gillespie testified falsely upon voir dire and further holds that the defense has not sustained its burden of proof in this regard.

Prior to trial the defense filed a motion to supress the evidence and therein demanded the return of the defendant's motor vehicle and any and all items taken therefrom. Upon hearing, the Court overruled this motion. Upon trial, the car itself was introduced as an exhibit and viewed by the jury and a seat cover from it likewise was introduced in evidence as well as expert testimony concerning blood spots found thereon.

Upon hearing on the Motion to Suppress it was developed that on Sunday, September 20th, shortly after noon the defendant was taken to the police station and questioned concerning this homicide. During the questioning, it developed that on the night of September 14th. or in the early morning hours of September 15th. he had been with the victim in his car and at the scene where her body was found. The defendant was then placed under technical arrest and a charge was preferred in court against him that afternoon at about 4:00 P.M. Orders were issued by the Sheriff to seize the car. Between the time that the defendant was picked up at his home for questioning and the time when the officers found the car it had been driven from the driveway of defendant's residence where it was at the time the defendant was taken in custody to the residence of another person who called upon the Sheriff to remove it, although no claim is made that that is the reason for the car

having been taken into custody by the Sheriff. It will be noted, however, that the taking of the car from the premises of this person in no way constituted a trespass upon the close of the defendant.

The main argument of the defense on the Motion to Supress was buttoned on the theory that because the seizure was not commensurate with the arrest of the defendant in point of time and space, a subsequent seizure of it followed by a search of it without a search warrant violated the rights of the defendant guaranteed by the Fourth Amendment of the United States Constitution through the Fourteenth Amendment and also by Section 14 of Article I of the Ohio Constitution. In other words, the question is squarely put under these circumstances whether the seizure of the defendant's car followed by a subsequent search of it violated his constitutional rights. Much reliance is placed by the defense on Preston vs United States, 376 US 364, 11 L. Ed. 2d 777, a late case by the United States Supreme Court decided March 23, 1964. In this case, the defendants were arrested on the street by city police officers for vagrancy and their car in which they were then seated was driven by a police officer to a police garage. Later on the car was searched and articles from it seized and turned over to federal authorities, which resulted in the defendants being tried for conspiracy to rob a federally insured bank. The court held that the search was not incident to the arrest and that the seizure of articles as a result of a search of the car was likewise illegal.

In Stoner vs. Californis, 376 US 483, 11 L. Ed. 2d 856, another case strongly relied on by the defense, search of the defendant's hotel room in California two days before his arrest in

Nevada on a charge of armed Robbery, although the offense had been committed, was not an incident to a lawful arrest and hence the search and resulting seizure of property was illegal.

In these two cases the rule seemed to be laid down that a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. In Stoner the court said, "The search was completely unrelated to the arrest both as to time and as to place." In Preston the court observed that the search was not undertaken until the defendant and his companion had been arrested (for vagrancy) and taken in custody to the police station and the car had been towed to a garage. Hence at that point there was no danger that the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime, even assuming that there are articles which can be the fruits or implements of the crime of vagrancy. The court also observed that since the car was already in custody there was no danger of its being moved out of the jurisdiction; and the court went on to say that the search was too remote in time and place to have been made as incidental to the arrest and held therefore that it was illegal.

This Court recognizes the austere authority of the United States Supreme Court to pronounce upon constitutional issues, but that is not to say that all that is pronounced by that court must always in so many words be literally followed. The ruling of the court must be read in the light of the facts and the case it was deciding. In Preston, as the court hinted, a motor vehicle could hardly be said to be an implement by which the offense of vagrancy could be committed, nor was there any reasonable or probable cause

to indicate that the motor vehicle either itself would be or would produce any evidence of such offense. In Stoner a search of the defendant's hotel room was conducted two days before his arrest and in another state. Obviously the search was not incidental to an arrest and no probable cause or necessity for a search without a warrant was shown.

In this Pruett case the officer had reasonable and probable cause to believe that the motor vehicle was an instrumentality used in connection with the crime of murder because of what the defendant himself had told him. Further, there was every reason to believe, therefore, that it might itself be or contain evidence of the crime, as in fact it did. Pruett was not under technical arrest until after he was questioned. In point of time, therefore, the seizure of the vehicle as closely as was possible was commensurate with his arrest. Under these circumstances, this Court holds that the seizure was incidental to the defendant's arrest. No one seriously doubts the right of officers to examine, inspect, and test in various ways any article of evidence after a lawful seizure of it. If an object used in connection with the crime being investigated can be seized without a trespass of which the defendant might rightfully complain, no search warrant is ever necessary. Thus the pistol with which a murder is committed, the engraving plates by which counterfeit money is printed, a motor vehicle which struck the hit skip traffic victim, goods which are the object of a larceny or burglary, may all be seized as evidence of the crime and without search warrant, so long as there is no trespass so far as the defendant is concerned.

Harris vs United States, 331 US 143, 91 L.Ed. 1399; United States vs Rabinowitz, 339 US 56, 94 L.Ed. 653; On Lee vs United States, 343 US 747, 96 L.Ed. 1270; People vs Chaigles, 237 NY 193, 32 ALR 666 (Cardozo); State vs. Hawkins 240 SW 2d 688 (Mo.) at 692, "Constitutional guarantees against unreasonable search and seizure apply where seizure is brought about by unlawful search. Those guarantees are not infringed where the recovery and possession of property theretofore stolen is accomplished without search and where such property lies fully disclosed, open to the eye, and in plain view." Hancock vs Commonwealth, 262 SW 2d 670 (Ky.); Bowles vs Misle, 64 Fed. Supp. 835 (DC Neb.); United States vs Yee Ngee How, 105 Fed. Supp. 517 (DC S.D.); State Theater vs Tri-States Theater Corporation, 11 FRD, 381 (DC Neb.).

The Fourth Amendment to the United States Constitution so far as here applicable provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue...."

Section 14 of Article I of the Bill of Rights of the Ohio Constitution so far as here applicable provides as follows: "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue...."

Seizure of an implement of crime is not an unreasonable seizure in and of itself under all circumstances. Cases are myriad which hold that only the unreasonable seizure is within the constitutional prohibition. In the opinion of this Court, the seizure of the defendant's motor vehicle was reasonable under the circum-

stances disclosed and certainly the search for it was not unreasonable.

Nowhere is it written that a seizure of evidence of a crime is prohibited except as that seizure may be the result of an unreasonable search. Here there was no unreasonable search for the car any more than if a homicide had been with a .38 and a search of the fields and byways was conducted for it. To complete the example, however, a search of the defendant's house for the .38 would require a search warrant unless the search was incidental to a lawful arrest. In either example, the object of the search is the .38. In either instance, a seizure of it may be made because it is an object of evidence of crime; but in the second example, a search warrant or its equivalent, i.e. a timely accompanying arrest, is necessary not because the defendant is to be protected in hiding or keeping the evidence but because his home shall not be violated by such a trespass.

Complaint is made that the verdict of the jury is not sustained by sufficient evidence and is contrary to law. A brief reference here concerning the evidence in the case is necessary. Without attempting to set forth in any detail the voluminous evidence that was presented, it is deemed sufficient for the purposes of this motion to point out that the following principal evidentiary facts, in the opinion of the Court, are established by credible evidence in the record to the extent that the jury would be justified in so concluding; and, therefore, for the purpose of decision on this motion only, may be said to be conceded to be true in the sense that the jury could have and did so find. The injuries suffered by Susan Osborne, which caused her death, are of such a nature as to conclusively carry the inference that someone purposely killed her. The purpose to kill would almost necessarily have to be concluded from the very nature of the injuries inflicted and in argument this fact seems even to be conceded by defense counsel.

The defendant was the last person known to have been with Susan Osborne prior to her death and this fact may well be drawn from the defendant's own testimony on the witness stand and from the testimony of Detective Roach and Norman Balcomb. The defendant was at the murder scene with Susan Osborne in his car. This fact can well be determined from the testimony of Detective Roach. The defendant and his wife concocted a false story concerning the disappearance of Susan Osborne when they told Ann Shackle and the Conneaut police that "they had let Susan out in Conneaut at Kerner's

Drug Store about midnight before they took Balcomb to Ashtabula," although the defendant and his wife obviously knew that the Conneaut police officers had a missing person report regarding Susan and were inquiring as to her whereabouts.

The defendant did not reveal to the Conneaut police what he later claimed was the true story about the disappearance of the deceased, namely, that she had jumped out of his car at the traffic light at 24th. and Lake Avenue. The defendant apparently started the return trip to Conneaut by way of Lake Avenue and Lake Road, but contended that he eventually returned via Route 20. He contended upon trial that he originally started back by way of Lake Road because he was to some extent under the influence of alcohol and wanted to avoid running into police as much as possible, but the jury might well have concluded that there was another reason, namely, to have sexual relations with the victim, as indicated to some extent from his declarations to Balcomb and Ann Shackle made earlier in the evening respecting a desire to "Switch Partners" (obviously referring to his own wife and the deceased) and that he was "going out with Susan" as claimed to have been related to him by Ann Shackle.

In attempting to determine the legal sufficiency of the evidence, the Court has chosen to break down the problem into two parts, i.e., (1) Is the evidence legally sufficient to warrant the jury finding that the defendant purposely killed Susan Osborne, and (2) If so, is the evidence legally sufficient to warrant the jury finding that he did so either while prepetrating or attempting a rape upon her. It should be kept in mind that a purpose to kill is requisite to either first degree or second degree homicide

and as the case is pleaded in this trial, the second element of first degree murder is that the purposeful killing occurred while the defendant was raping or attempting to rape the decedent. This element obviously is that which takes the place of deliberate and premeditated malice in the ordinary first degree case, which element however, was not pleaded by the prosecution herein.

With reference to the first element then, it appears to the Court that the question may well be put thusly. Where a purposeful homicide is satisfactorily shown, is proof that the defendant was at the scene with the victim at or about the time in question plus his falsification to investigating officers and others relative to his connection with the disappearance of the victim sufficient to warrant a finding that the defendant purposely killed the victim when the false story of the defendant relative thereto is not satisfactorily explained but instead the concoction of it is attributed by the defendant to another?

Before proceeding further with this inquiry, it must be kept in mind that the jury, as presumably it may well have done, decided against the defendant with reference to his having made up this story of the victim's disappearance, which from the standpoint of an analysis of the sufficiency of the evidence is to totally gainsay the defendant's contention that the falsehood was the manufactured product of the other person.

That the above recited facts are circumstantial evidence is not to be denied logically, but raise the question as to whether the jury may infer from them that the defendant purposely killed the victim. Are these facts consistent with his guilt and inconsistent with his innocence?

Suppression, or fabrication, or attempts to fabricate, or to procure false evidence, or to destroy evidence, are said to be always admissible against a defendant on the theory of showing of consciousness of guilt, which is in the nature of an admission on the theory that it is not to be supposed that an innocent person would feel the necessity therefor. This is practically the universal rule and there is almost a total dearth of authority to the contrary. Literally hundreds of cases are reported in the digests on the subject but obviously only a few are referred to in this opinion. See 20 Am. Jr. para. 289; State vs Smith, 194 SW 2d. 905, (MO); State vs Christian, 245 SW 2d. 895, (Mo.).

Evidence of this caliber is said to be cogent evidence of guilt. See Harris vs. U.S., 169 Fed. 2d. 887; Harvey vs U.S. 215 Fed. 2d. 330; State vs Broadhurst, 196 Pac. 2d. 407, (Ore.); State vs Thompson, 24 NW 2d. 10, (S.D.); Commonwealth vs Snell, 75 NE 75, (Mass.).

False statements made by the defendant apparently for the purpose of misleading investigating officers and warding off suspicion are admissible against him and are said to be strong indications of guilt. People vs Rumley, 222 Pac. 2d. 913 (Cal.); People vs. Porter, 223 Pac. 2d. 102 (Cal.); Commonwealth vs Bonomi, 142 NE 2d. 140 (Mass.).

Exculpatory statements made on interrogation with intent to divert suspicion or mislead police when shown to be false are circumstantial evidence of guilty consciousness and have independent probative force. United States vs Anthony, 145 Fed. Supp. 323. It is said that such statements are in the nature of substantive evidence in and of themselves. See State vs Redfern, 98 SE 2d.

322 (N.C.); Commonwealth vs Kiefaber, 179 Atlantic 2d. 262 (Pa.); People vs Jordan, 22 Cal. Reptr. 731; Bennett vs State, 377 Pac. 2d. 634 (Wyo.).

In Ohio, as elsewhere, flight following commission of a crime has long been regarded as evidence of guilt unless satisfactorily explained because it tends to show a consciousness of guilt or a guilty connection with the crime. Ohio stands strongly committed to the "consciousness of guilt" theory as being a circumstance from which guilt may be inferred along with other circumstances and facts, and this Court can see no good reason why the rule promulgated by almost all the cases outside of Ohio dealing with the subject matter of suppression of facts and false statements to throw off suspicion as set forth by the cases outlined above should not be applicable in Ohio, although the cases directly in point in this state are very limited in number. See State vs Viola, 51 Abs. 577; Grillo vs State, 6 OCD 90; State vs Grambo, 82 App. 473; Sinatra vs State, 17 Abs. 481.

In State vs Schaeffer, 96 OS 216, an automobile manslaughter case in which the defendant claimed he did not know he had struck the deceased but was cross examined concerning his failure to report the matter after he learned the deceased had been struck, the following language appears on page 222 of the opinion: " It has always been held admissible to show the conduct of the accused immediately after the time he is charged with having committed an offense for the purpose of showing innocent or guilty conduct as the case may be." In Mefford vs State, 13 App. 105 at pg. 107, the court said: "Attempt to supress evidence indicate a consciousness of guilt and if proved to have been made by defendant are highly

probative of criminality." The same rule was recognized in Richards vs State, 43 App. 212, at pg. 221. The Supreme Court in Cleveland vs. McNea, 158 OS 138, at pg. 142 said as follows: "The destruction and suppression of adverse evidence constitute a prejudicial circumstance of much weight as does also the fabrication of a false defense."

In the case at Bar, the defendant and his wife testified to the giving of the false explanation, but claimed Balcomb was the orginator of the idea and that they told it in order not to put Balcomb in an embarrassing position with his wife. Balcomb, on the other hand, testified that the idea was urged upon him by the defendant and his wife to protect the defendant against possible dismissal from the Manpower Training School.

The jury found against the defendant on this issue and likewise thereby found this evidence to be some proof of the principal fact charged against the defendant. In this, the jury was justified according to all the authorities.

The next issue to be determined is whether or not the evidence is legally sufficient to warrant the finding of the jury that the defendant killed Susan Osborne while committing rape or attempting to commit rape upon her. This, of course, is an essential material fact to be found by the jury and sustained by the proof in order to sustain the verdict of murder in the first degree.

The evidentiary facts heretofore recounted and the proper inferences to be drawn therefrom must be kept in mind. In addition thereto, the following facts and the reasonable inferences which may be drawn therefrom must be taken into consideration. The

completely nude body of Susan Osborne was found flat on the back with the legs spread. A small superficial stab wound in the upper left chest corresponded in position with a small cut in her blouse. A large quantity of blood appeared on both the blouse and her brassiere. Her clothes were not torn and seemingly were placed in a pile near her feet, with the exception of her jacket which was under her buttocks. Blood of the same type as the deceased's was found on the seat cover of the defendant's car. There was no evidence of a struggle on the ground. Detective Roach testified that the defendant told him that at the scene he "made a couple of passes" at the deceased and that she got out of the car and he followed her out the same door. The medical testimony of the state tended to sustain the theory of sexual intercourse.

Acknowledging that this evidence is circumstantial in character, does it point toward and is it consistent with the State's theory of rape or attempt to commit rape?

The elements of the offense of rape or the attempt to commit it, like the element of purposeful killing, may be established by circumstantial evidence in cases of homicide. People vs Lindley, 161 Pac. 2d 227 (Cal.); MacAvoy vs State, 15 NW 2d. 45 (Neb.); Hill vs State, 39 SE 2d.675 (Ga.); State vs Folk, 277 Pac. 2d. 1016 (Ariz.); People vs Reed, 240 Pac. 2d. 590 (Cal.); People vs. Moore, 310 Pac. 2d. 969 (Cal.); People vs Doherty, 193 NE 2d. 37 (Ill.); Lipscomb vs. State, 165 Atlantic 2d. 918 (Md.); People vs Griffin, 32 Cal. Reptr. 24; Black vs State, 222 SW 2d. 816 (Ark.); People vs. Lawrence, 259 Pac. 2d. 439 (Cal.); People vs Harris, 118 NE 2d. 470, 306 N.Y. 345 (128 N.Y. Supp. 2d.).

This is but in recognition of the well established principle that in the absence of statutory enactment to the contrary, whatever may be established by direct evidence in a criminal case also may be established by circumstantial evidence. 20 Am. Jur. 261, para. 273.

Before proceeding further, it is well to keep in mind, in an effort to keep the thinking straight, that the evidence tends strongly to maintain the theory that the beating resulting in the death of the deceased and the rape or attempt to commit rape, if there were either, all occurred at the scene where the deceased's body was found. Whether the beating occurred before, during, or after the rape or attempted rape makes no difference. It was part of the res gestae of the crime and if done pursuant to that felonious intent or even after technical completion of such felony, if that be the fact, it nevertheless would result in murder in the first degree. See Conrad vs State, 75 OS 52; State vs Habig, 106 OS 151; Callahan vs State, 201 NE 2d. 338 (Ind.); Commonwealth vs Almeida, 68 Atlantic 2d. 595 (Pa.); 12 ALR 2d. 183.

Reference next is made to some of the Ohio cases dealing with homicide in the commission of some other felony on the point of the weight and sufficiency of the evidence. In Turner vs State, 21 Abs. 276, it was held that where only a belief in the truth of the defendant's story would justify a verdict other than guilty of first degree homicide, such a verdict was not against the weight of the evidence. Without saying so in so many words practically the same result was reached in Dull vs State, 36 App. 195, a case of homicide during a robbery when the real issue on the weight of the evidence turned on the acceptance or rejection by the jury of

a statement claimed by the officer to have been made by a defendant, but which he denied on the witness stand.

In State vs Rogers, 64 App. 39 (our own court), a case of homicide during perpetration of a robbery, the defendant did not participate in the actual shooting but was behind the wheel of the automobile parked a short distance away from the scene. There was a conflict in the evidence as to whether the conspiracy of the three original defendants (separate trials had been granted) was to rob or simply to steal a case of milk. Obviously in the latter instance, because larceny is not one of the felonies mentioned in the statute, there could be no conviction of murder in the first degree, and the verdict then would be both contrary to the weight of the evidence and contrary to law. The evidence was held sufficient to permit the jury to draw the inference of perpetration of robbery.

In Schneider vs State, 1 OCD 565, the ultimate facts that 1) the defendant killed his mother, and 2) in perpetrating a robbery of her, were upheld on the basis of circumstantial evidence only. Blythe vs State, 2 OCD 636, is another case of similar import. Both of these cases decided by the Hamilton Circuit Court and both affirmed by the Supreme Court point out the right of the jury to reject the story or explanation of the defendant when the surrounding circumstances in any way reasonably seem to justify such rejection.

The following are analysis of and exerpts from some of the cases cited supra on homicide rape convictions. In People vs Lindley, 161 Pac. 2d 227, the victim, a thirteen year old girl, was found beaten but was still alive lying in some bushes. She died

about an hour later. Her clothes were torn, there were vaginal bruises. She had been seen fighting with the defendant. Another prisoner claimed the defendant had admitted grabbing and choking the victim, which fact was denied vehemently by the defendant, but he was shown to have been in the vicinity and to have had the opportunity to attack and leave the victim where she was found. The jury found him guilty of homicide in attempt to commit a rape. From the opinion, page 233 -- "If the evidence establishes conclusively that the murder was so committed then only a verdict of murder in the first degree may properly be rendered and even where the showing is not conclusive, if the record affords substantial support for the conclusion that one of the enumerated felonies was perpetrated or attempted and the killing was committed in such perpetration or attempt, the judgment must be affirmed (cases cited)....After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it. (cases)....Unquestionably the jury reasonably could have drawn from the evidence the inference that the girl was killed in the perpetration or attempted perpetration of rape....the girl's physical condition, the marks on her body coupled with all the other evidence amply support the conclusion that death resulted from injuries sustained either in a rape or attempted rape committed by Lindley..... under such circumstances the absence of independent proof of premeditation or deliberation is immaterial. The jury, once satisfied that a rape was perpetrated or attempted and that Lindley was the assailant, had no alternative but to return a verdict of murder in the first degree."

People vs Reed, 240 Pac. 2d 590, from page 595, "It is not the providence of this court to determine conflicts in the evidence nor to choose between different inferences which reasonably may be drawn from the testimony. The sole question so far as the admissible evidence is concerned relates to its sufficiency to support the verdict. The ultimate fact found by the trial court (jury) was that the defendant was guilty of murder in the first degree. If there is substantial evidence in the record to support that judgment, the determination must be upheld. (cases cited)....Applying this rule to the record in this case and conceding that the prosecution is limited to the theory of murder committed in perpetration of rape, it cannot be said that 'upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below'.....The victim was found dead as a result of violence. There is evidence tending to prove that sexual intercourse had been accomplished. The jury was not required to conjecture that the intercourse had been with consent. A reasonable inference to be drawn from the evidence is that (the victim) offered resistance and was raped.... Considering the entire testimony, it amply supports the implied finding of the jury that Reed killed the victim in the perpetration of rape."

See the following language from People vs Harris, supra, at pg. 473 of the opinion, "it is of course conceivable that after defendant left the girl in the hallway someone else came upon her and strangled her, but that is a possibility merely of the same kind present in many other affirmed criminal cases. The question of law is not whether someone else may possibly have strangled her... it is whether the proof points logically to the defendant's guilt

and excludes to a moral certainty every other reasonable hypothesis, that is, whether the proven facts are consistent with and point to defendant's guilt and are inconsistent with his innocence. (cases cited.).... We see no break here in the chain of evidence which points to the defendant and to no one else, unless we are to demand absolute or metaphysical certainty in which event there never could be a conviction on circumstantial evidence alone. This proof meets the established test, likewise as to whether the killing was done while a rape or attempt to rape was being committed. That there was a rape or attempt is fairly inferrable from this proof: defendant's threat, his tussle with the girl, her torn underclothes, her drunken condition, his statement that she fell to the floor before the intercourse. The Trial Court in his charge authorized the jury to find either rape by force or fear or because of intoxication preventing resistance. We think the proof justified much instruction... There was a tussle, there was resistance, the victim's clothes were torn open, there was intercourse, she was strangled to death."

It is not the separate links in the chain of circumstantial evidence which are looked to separately, to determine the legal sufficiency of the evidence, but rather whether when taken as a whole these links make a case which cannot be reconciled upon the hypothesis of innocence. See State vs Butler, 43 Op. 321. It seems to this Court that the rule with reference to the quantum of evidence of a circumstantial nature which will be held legally sufficient to uphold a conviction is oftimes repeated but seldom carefully enough analyzed. As this Court sees it, the issue is whether or not any one link or any one set of circumstances in the

total chain of evidence relied upon to support the conviction, of itself will support an inference only of innocence rather than of guilt. In such a case the total chain of evidence is legally insufficient. Such an example is State vs Domer, 1 OA 2d 155, Ohio Bar, Feb. 1, 1965, a case cited in argument by the defense.

One of the points passed upon by the Court of Appeals was the sufficiency of the evidence of a circumstantial nature concerning in what manner the deceased met his death. A necessary element in the State's case was to prove that the victim was alive prior to the time the defendant poured gasoline over him and the motor vehicle and set them afire. The expert testimony showed there was no trace of carbon monoxide in the victim's blood. The conclusion of the experts was that this proved that the victim was dead at the time the fire was started. On this point the court in its opinion said, "Certainly when considering the state of the record on the question of whether Riddle was alive when the fire was started, as claimed by the State, with the many other factors developed in the record challenging such conclusion, it cannot be said that the State has shown defendant caused the death of Riddle by incineration beyond a reasonable doubt...."

In making an analysis of the evidence in seeking a correct determination of this difficult problem, it seems to me that the Court should attempt to analyze those facts which the jury were justified in finding from the evidence produced and then to determine from those chief evidentiary facts in the chain of circumstantial evidence whether they as a whole point unerringly to the guilt of the defendant and cannot be reconciled with the theory of his innocence. If that be the analysis, the verdict may stand; if

not, the verdict must fall. (See dissenting opinion of Taft in State vs Sheppard, 165 OS 306.)

From the evidence in this case the jury could have found the following principal evidentiary facts, namely: that the defendant said he was going out with the deceased; that he wanted to have intercourse with her; that he was the last known person with her; that he was at the scene with her where her body was found; that the deceased was murdered at this scene; that sexual intercourse with the deceased had been had at the scene by someone, either forcibly or under threat, or if intercourse were not actually consummated, then at least that there was an attempt at it; that the defendant falsely stated the whereabouts of the deceased as he knew them to be when she was missing and being sought; that the defendant on the stand falsely attributed this deceptive explanation to another person. Do these facts and circumstances taken as a whole support the inference of the defendant's guilt and do they exclude every reasonable hypothesis except that the defendant's guilt?

These facts and circumstances are all consistent with each other, each is independently proved, none is inconsistent with the guilt of the defendant, and all of them when taken together are consistent with the defendant's guilt and point unerringly to the defendant and to no one else.

In contravention of the argument that to permit the drawing of such conclusions or inferences is but piling one inference upon another, in the opinion of the Court it is a question of permissible and logical parallel inferences that may be drawn from otherwise proved evidentiary facts. Such is not a violation of

the inference upon inferencerule. See State vs. Martin, 164 OS 54; McDougall vs Glenn Cartage Company, 169 OS 522.

The jury as the trier of the facts must determine the truth or falsity of an asserted secondary fact from which an inference or primary fact is to be drawn in the chain or cable of circumstantial evidence. It is the duty of the Court to pronounce as a matter of law whether the inference may be drawn. It is the function of the jury to say whether or not it will be drawn. If the inference is a logical and permissible one, the Court shall permit it. Then if the jury concludes the inference, it in turn becomes an evidentiary fact. If the evidentiary facts, whether they be the product of direct evidence or circumstantial evidence or both, convince the jury beyond a reasonable doubt of the defendant's guilt, then barring error or indication of passion or prejudice, the verdict should be upheld. It is not the Court but the jury that must be and by its verdict of guilty say that it is satisfied of the defendant's guilt beyond a reasonable doubt.

From the previously recited evidentiary facts, the Court holds that logical and legally permissible inferences may be drawn that there was either a rape or an attempt to commit rape, that there was an intentional killing during the pursuit of such felonious intent, that the defendant was the person responsible therefor. The jury in this case so inferred or concluded and by its verdict has said it is so satisfied beyond reasonable doubt. Individually each member of the jury so spoke upon poll of the jury in open court. This Court cannot say that the jury ought not to have so found or that it should have returned a verdict of not guilty of murder in the first degree but guilty of murder in the

second degree or of manslaughter, even if the Court were it the trier of the facts might possibly have concluded otherwise. As the Supreme Court of Ohio in the recent case of State v. Antill, 176 OS 61 said, "When from the evidence reasonable minds can reach different conclusions on the issue of whether or not the defendant is guilty beyond a reasonable doubt, the case is one for the determination by the jury."

The Court finds no error prejudicial to the rights of the defendant. The Motion for New Trial will be overruled with exceptions noted.

ROLAND PONTIUS, JUDGE

March 27, 1965.

THE SUPREME COURT OF OHIO

State of Ohio,
Plaintiff-Appellee,

v.

Robert LeRoy Pruett,
Defendant-Appellant.

Case No. 41163

C E R T I F I C A T E

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true and correct copy of the notice of appeal, memorandum of appellant and memorandum of appellee filed in this Court in the above entitled case.

I further certify that the foregoing is a true and correct copy of the transcript of docket and journal entries of this Court in the above entitled case.

I further certify that the foregoing is the original of the Precipe and Notice of Appeal to the Supreme Court of the United States filed in this Court in the above entitled case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 4th day of March, 1968.

Thomas L. Startzman
CLERK, THE SUPREME COURT OF OHIO

John L. Jenkins
Deputy Clerk